RECORD
AND
BRIEF

FILED
APR 10 2017

No. 16-399

IN THE

Supreme Court of the United States

ANTHONY W. PERRY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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April 10, 2017

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INTRODUCTION

It has been said of the Bourbon monarchs that, in the wake of the French Revolution, they learned nothing and forgot nothing. The same is true of the Government in the wake of *Kloeckner v. Solis*, 133 S. Ct. 596 (2012). Although this Court unanimously rejected the Government's position in that case, the Government once again trots out many of the same arguments, including those that this Court specifically considered and rejected in *Kloeckner*. Once again, this Court should reject the Government's position, which would make a hash of the text, structure, and purpose of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq.*, and erect needless roadblocks on the path to the just and efficient adjudication of federal employees' employment-related claims.

The parties here disagree on what is necessary to make an employee's appeal to the Merit Systems Protection Board (MSPB) a so-called "mixed case," *i.e.*, a "[c]ase[] of discrimination subject to the provisions" of the CSRA, 5 U.S.C. § 7703(b)(2). Petitioner, applying the CSRA's text and traditional background pleading rules, contends that it depends on the employee's allegations. The Government, in contrast, contends that it depends on the Board's ultimate resolution of those allegations. As petitioner explained in his opening brief, the Government's position is just the sort of cart-before-the-horse approach that sensible jurisdictional rules are supposed to avoid. Furthermore, the Government's position is irredeemably circular, because the Board's resolution of those allegations is not, and is not meant to be, final. Rather, everyone

agrees that an employee seeking to pursue both a serious civil-service claim and a discrimination claim is entitled to judicial review of an adverse Board decision—the only question is whether that review should take place in district court or in the Federal Circuit. There is no basis in law or logic for the Government's theory that the Board's jurisdictional determination is conclusive of which court should review that very determination.

Indeed, the Government concedes—as it must—that the Federal Circuit *cannot* review a discrimination claim, because the CSRA expressly gives a plaintiff a right to a trial *de novo* (which may even involve a jury) on such a claim. Not to worry, says the Government: the discrimination claim will lie fallow in the Federal Circuit while that court reviews only the MSPB's jurisdictional determination. And if the Federal Circuit affirms the MSPB, the employee can start all over again by filing a new "pure" discrimination case subject to review in district court.

But that approach turns the whole statute upside down. Congress created a mechanism for federal employees to pursue "mixed" cases precisely so that they did not have to bifurcate their claims and proceed on two separate tracks. The Government's approach necessarily results in the very claim-splitting that the statute seeks to avoid. Congress certainly could have devised a scheme in which civil-service claims are reviewed in the Federal Circuit while discrimination claims are reviewed in district court. But, as this Court made clear in *Kloeckner*, that is not the scheme that Congress devised in the CSRA. To the contrary, that statute expressly

provides for an employee to pursue *both* serious civil-service claims *and* discrimination claims together in a single "case" subject to review in district court.

The Government insists, however, that this approach would subvert one of the CSRA's alleged major purposes: to foster the development of a uniform body of civil-service law in the Federal Circuit. But this Court rejected that very policy argument in *Kloeckner*. There is no question that mixed cases involving *substantive* civil-service issues (in which the Government presumably has the greatest interest in uniformity) are reviewed in district court—and thereafter, if warranted, in the regional circuits. Ditto, in light of *Kloeckner*, for mixed cases involving *procedural* civil-service issues. It is fanciful to suppose that Congress would have wanted to vest the Federal Circuit with exclusive authority to develop uniform *jurisdictional* civil-service law if it did not want to vest the Federal Circuit with exclusive authority to develop uniform *substantive* or *procedural* civil-service law. Indeed, as *Kloeckner* acidly noted, the whole "uniformity" argument is bogus because the Federal Circuit did not even exist when Congress enacted the CSRA in 1978. *See* 133 S. Ct. at 607 n.4. The Government's decision to peddle this argument once again represents a triumph of hope over experience.

Nor does the Government make any real attempt to address the practical problems inherent in its approach, including an employee's inability to know at the time of filing whether he has a mixed case subject to the CSRA's procedures, and the difficulty posed by determining whether a particular MSPB dismissal was indeed "jurisdictional," as opposed to

procedural or substantive, in nature. This case is a perfect example—the MSPB labeled its dismissal "jurisdictional" even though the Board's determination was clearly substantive: it concluded that petitioner had validly released his claims through a settlement. Thus, as explained below, the Government's position in this case is unsound as a matter of both text and policy.

ARGUMENT

MSPB Decisions Dismissing Mixed Cases Are Subject To Review In District Court.

A. The Government's Textual Arguments Are Unsound.

1. The Government's efforts to seize the mantle of textualism in this case are unavailing. As the Government notes, the "[c]ases of discrimination subject to the provisions of section 7702," which are subject to review in district court, 5 U.S.C. § 7703(b)(2), are cases that involve not only a discrimination claim but also a civil-service claim arising from "an action which the employee ... may appeal to the [MSPB]," *id.* § 7702(a)(1)(A). If the MSPB determines that the civil-service claim does *not* arise from "an action which the employee ... may appeal to the [MSPB]," *id.*, the Government says, then the case is not a mixed case subject to review in district court. U.S. Br. 18-26; *see also* Pet. App. 11a; *Conforto v. MSPB*, 713 F.3d 1111, 1118 (Fed. Cir. 2013). Rather, even though such a case concededly contains a discrimination claim but ostensibly lacks an appealable civil-service claim, the Government declares that the Federal Circuit is the exclusive forum for review. *See* U.S. Br. 18-26.

But that is not a textual argument at all. If the MSPB concludes that a particular civil-service claim is beyond its jurisdiction, all we know is that the MSPB has concluded that the claim is beyond its jurisdiction. That does not mean that the MSPB is correct. To the contrary, everyone agrees that MSPB decisions on jurisdictional issues, just like MSPB determinations on any other issues, are subject to review by an Article III court. The question here is *which* Article III court—a district court or the Federal Circuit? And that question, in turn, depends on whether the matter qualifies as a mixed case—the very issue on which the employee seeks judicial review.

According to the Government, the employee by definition has not brought such a case if the MSPB says so. The Government articulates this argument, which has no basis in the statutory text, in various ways. At times, the Government says that the MSPB's jurisdictional determination—even though it is subject to judicial review—"warrants deference." U.S. Br. 15; *see also id.* at 21 ("Treating the case as mixed, notwithstanding the MSPB's determination that it does not involve an appealable action, would be inconsistent with fundamental principles of deference to administrative decisions."). At other times, the Government says that "the MSPB's decision as to appealability should be treated as *presumptively* correct." *Id.* at 22 (emphasis added); *see also id.* at 15-16 ("Unless and until [the Board's jurisdictional determination] is reversed ... the mixed-case provisions ... are inapplicable."). And at other times, the Government suggests that the MSPB's determination is conclusive: "When the MSPB

determines that a discrimination case does not involve 'an action which the employee ... may appeal to the [Board],' 5 U.S.C. § 7702(a)(1)(A), the case *cannot be considered* a '[c]ase of discrimination subject to the provisions of section 7702,' 5 U.S.C. § 7703(b)(2)." U.S. Br. 21 (emphasis added); *see also id.* at 18 (employee seeking review of MSPB jurisdictional determination "cannot disregard the MSPB's determination of nonappealability.").

It is no surprise that the Government cannot settle on a single formulation of this "fundamental principle[]," U.S. Br. 21, because it is made up. It is one thing for courts, in appropriate circumstances, to defer to an agency *in the course of reviewing agency action*. *See, e.g., Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). But this case does not arise in the posture of judicial review of agency action. Rather, the question here is which court should review agency action in the first place. Congress did not leave a statutory gap with respect to which Article III court should review mixed cases, and even if it had, it is implausible that Congress intended to delegate to the Board the power to fill any such gap. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 227-30 (2001).

Because there is no basis for deferring to the Board's jurisdictional determination in assessing which court should review that very determination, the natural inference is that Congress meant for courts to follow the traditional background rule that the choice of forum is based on the complainant's allegations. *See* Petr. Br. 21-23 (citing, *inter alia*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *Bell v. Hood*, 327 U.S. 678, 682 (1946)). Because petitioner *alleged* that (1) he was "affected by an action which [he] may appeal to the [MSPB]," and (2) "a basis for the

action was discrimination," 5 U.S.C. § 7702(a)(1)(A),(B), he brought a "[c]ase[] of discrimination subject to the provisions" of the CSRA, *id.* § 7703(b)(2), and may seek review of the Board's disposition of that case in district court. *See, e.g.*, *Elgin v. Department of Treasury*, 132 S. Ct. 2126, 2134 (2012) ("§ 7703(b)(2) demonstrates that Congress knew how to provide alternative forums for judicial review based on *the nature of an employee's claims*.") (emphasis added). The grounds for the Board's decision have no bearing on the forum for review of that decision, just as appeals from a federal district court decision dismissing a case for lack of diversity jurisdiction do not go to a *state* appellate court.

2. Not so fast, says the Government: the statute uses the verb "allege" only once, in connection with the discrimination component of a mixed case. *See* U.S. Br. 43 ("[A]n MSPB decision is reviewable in district court if the employee '*has been affected* by an action which [he] may appeal to the [MSPB],'" and '*alleges* that a basis for the action was discrimination.'") (quoting 5 U.S.C. § 7702(a)(1); emphasis added by Government). The Government then invokes the *expressio unius est exclusio alterius* canon, and argues that "Congress could have simplified the statute by placing the word 'alleges' in a location where it would have applied to both criteria." *Id.* at 43-44.

As this Court has often explained, however, the *expressio unius* canon is not such a blunt instrument. "'The force of any negative implication, ... depends on context.'" *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 2017 WL 1050977, at *10 (Mar. 21, 2017) (quoting *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013)). Thus, "[t]he *expressio unius* canon applies only when 'circumstances support[] a sensible

inference that the term left out must have been meant to be excluded.'" *Id.* (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)).

Here, that inference would not be sensible at all. Subsection 7702(a)(1)(A) mirrors Section 7513(d), which provides that "[a]n employee against whom an action is taken under this section is entitled to appeal to the ... Board." Because the right to appeal granted by Section 7513(d) must be determined prior to the appeal itself—and thus cannot rationally depend on the outcome of the appeal—it necessarily must be grounded in the employee's factual allegations in presenting his case to the Board. It follows that the the same understanding should apply with respect to the similar language "action which the employee may appeal" in Subsection 7702(a)(1)(A), *i.e.*, that it is referring to actions that the employee alleges as the basis of his grievance. By contrast, Subsection 7702(a)(1)(B) does not track any other provision of the statute, and so the mere inclusion of the word "alleges" in that subsection but not in Subsection 7702(a)(1)(A) provides no basis to conclude that "Congress considered [whether jurisdictional allegations suffice under Subsection (a)(1)(A)] and meant to say no." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

Indeed, applicable regulations recognize this commonsense point, and define a "mixed case appeal" as "an appeal filed with the MSPB that *alleges* that an appealable agency action was effected, in whole or in part, because of discrimination ...." 29 C.F.R. § 1614.302(a)(2) (emphasis added); *see also Kloeckner*, 133 S. Ct. at 607 ("A federal employee who *claims* that an agency

action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1) should seek judicial review in district court.") (emphasis added). In a footnote, the Government declares that "[p]etitioner's reliance on *potentially ambiguous* language in the regulations" and in *Kloeckner* is "misplaced," because those authorities "generally track the statutory language and do not attempt to redefine it." U.S. Br. 44 n.7 (emphasis added). But that attempt to dodge an on-point regulation and *Kloeckner* assumes that the statutory language clearly answers the question presented here in the Government's favor. As explained above, it does not, and the regulation and *Kloeckner* certainly suggest that the Government's interpretation of the statute is wrong.

3. Other provisions of the statute reinforce the point. An employee pursuing a mixed case, after all, may bypass the Board altogether. Instead, such an employee may pursue the case through his agency's Equal Employment Opportunity (EEO) office and then, if still aggrieved, proceed directly to district court, which may consider *both* the employee's civil-service and discrimination claims. *See* 5 U.S.C. § 7702(a); 5 C.F.R. § 1201.154(a); 29 C.F.R. § 1614.302(b); *see generally Kloeckner*, 133 S. Ct. at 601. Because the Board need not address a mixed case at all, it cannot be that a jurisdictional determination by the Board is either necessary or sufficient for a mixed case to exist. *See* Petr. Br. 26.[1]

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[1] The Government asserts that "[a]n employee who chooses th[e] path [of pursuing a mixed case through her agency EEO office rather than the MSPB] is bypassing the opportunity to

An employee pursuing a mixed case may also bypass the Board (or the agency) and proceed directly to district court if the Board (or the agency) does not resolve the case within 120 days. *See* 5 U.S.C. §§ 7702(a)(1),(2), (e)(1); *see generally* U.S. Br. 28 n.4. Under the Government's interpretation, however, there is no way to know whether a case is "mixed" (and thus the 120-day clock triggered) unless and until the Board ultimately so determines. So the Government concocts an *ad hoc* solution, declaring that "it is necessary as a practical matter to credit an employee's allegations of appealability at the outset of a case, before the MSPB has had an opportunity to make a more definitive determination." U.S. Br. 45 (internal quotation omitted). Those allegations "are no longer controlling," the Government asserts, if the MSPB rejects them. *Id.*

But that assertion misses the point: under the Government's position, there is no way to know whether the 120-day clock is triggered at all unless and until the Board has ruled. *See* Petr. Br. 26-27. And the Government never explains what happens to a pending district-court action if the Board determines after the 120-day deadline that the alleged civil-service action was not appealable and hence (under the Government's view) the case was

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present civil-service claims to the MSPB, *and instead opting to focus solely on her discrimination claims*." U.S. Br. 7-8 (emphasis added). The italicized portion of that sentence, which is unsupported by any citation, is manifestly incorrect. The CSRA expressly authorizes federal employees to pursue mixed cases through their agency, with review in district court, without giving up their civil-service claims. *See* 5 U.S.C. §§ 7702(a)(2), (e)(1)(A), 7703(b)(2).

never a mixed case at all. Because the coherent operation of Section 7702 requires a focus on the employee's allegations, not the MSPB's ultimate conclusions, those allegations, rather than those conclusions, determine whether a case is a "[c]ase[] of discrimination subject to the provisions of section 7702" that is reviewable in district court. 5 U.S.C. § 7703(b)(2). Here, as in *Kloeckner*, the Government's contrary "textual" argument "is a contrivance, found nowhere in the statute's provisions on judicial review." 133 S. Ct. at 604.

B. The Government's Policy Arguments Are Unsound.

1. Presumably recognizing the weakness of its textual arguments, the Government devotes the bulk of its brief to advancing a policy argument: that "Congress created [the Federal Circuit] in part to serve as the centralized forum" for reviewing issues relating to MSPB jurisdiction. U.S. Br. 15; *see also id.* at 18 ("[T]he Federal Circuit ... was created in part to centralize the law governing appealable actions and ... has exclusive authority to review all MSPB appealability determinations."). According to the Government, the CSRA reflects a "structural preference for 'the primacy of the United States Court of Appeals for the Federal Circuit for judicial review'" of MSPB decisions generally, *id.* at 16 (quoting *United States v. Fausto*, 484 U.S. 439, 449 (1988)), and for "exclusive Federal Circuit review of MSPB nonappealability determinations in discrimination cases" in particular, *id.* at 26 (capitalization modified).

That policy argument is yet another contrivance. It is certainly true that, as a general matter, Congress has given the Federal Circuit "'primacy'" in reviewing MSPB decisions. U.S. Br. 5, 16, 27 (quoting *Fausto*, 484 U.S. at 449); *see generally* 5 U.S.C. § 7703(b)(1)(A). But the CSRA carves out an important exception to that general rule: it vests the district courts, not the Federal Circuit, with exclusive jurisdiction to review MSPB decisions in cases involving both serious civil-service claims and discrimination claims. *See* 5 U.S.C. § 7703(b)(2). And, as the Government grudgingly but necessarily concedes, *see* U.S. Br. 10, such district-court review extends not only over the discrimination claims, but over the whole "case," including the civil-service claims, *see, e.g.*, *Kloeckner*, 133 S. Ct. at 607 n.4; *Sher v. United States Dep't of Veterans Affairs*, 488 F.3d 489, 499 (1st Cir. 2007) (collecting cases).

Because the CSRA vests district courts with exclusive authority to review MSPB decisions in cases involving serious civil-service claims as well as discrimination claims, the Government does not (and cannot) argue that Congress gave the Federal Circuit exclusive authority to develop a uniform body of *substantive* civil-service law. Nor, in light of *Kloeckner*, can the Government argue that Congress gave the Federal Circuit exclusive authority to develop a uniform body of *procedural* civil-service law. Thus, the Government is reduced to arguing that the Congress gave the Federal Circuit exclusive authority to develop a uniform body of *jurisdictional* civil-service law. But it beggars belief to suppose that, as a policy matter, Congress was fine with having district courts develop substantive and

procedural civil-service law but drew the line at jurisdictional civil-service law.[2] Indeed, that suggestion gets matters backwards: if anything, substantive and procedural civil-service law tends to implicate discretionary policy concerns far more than jurisdictional civil-service law, which is largely a creature of statute. And, of course, decisions by the district courts are reviewable by the regional circuits and ultimately by this Court, which provides the ultimate forum for ensuring uniformity on all of these various issues (as on all other issues of federal law).[3]

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[2] In a futile attempt to salvage the coherence of its "uniformity" theory, the Government disclaims its own ability to "contest the Board's appealability determination" in "an assertedly mixed case in which the employee prevails on appealability but loses on other grounds and seeks review in district court." U.S. Br. 28 n.4. But the Government identifies no textual basis for that disclaimer. Again, this sort of *ad hoc* response underscores, but does not solve, the manifest analytical flaws in the Government's theory.

[3] In passing, the Government also suggests a potential uniformity problem posed by a CSRA provision authorizing the Director of the Office of Personnel Management to seek Federal Circuit review of an adverse MSPB decision in extraordinary circumstances. *See* U.S. Br. 27-28, 29, 30-31 (citing 5 U.S.C. § 7703(d)(1)). Under that provision, "[t]he Director may obtain review of any final order or decision of the Board by filing ... a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. § 7703(d)(1). "The granting of the petition for judicial review shall be at the discretion of the

In any event, the Government's uniformity arguments here are a reprise of the uniformity arguments it advanced unsuccessfully in *Kloeckner*:

- *Compare*: "One of the key structural elements of the CSRA is the primacy of the United States Court of Appeals for the Federal Circuit for judicial review." U.S. Br. 27 (internal quotation omitted);

  With: "[O]ne of the primary structural elements of the CSRA is the primacy of the Federal Circuit as the forum for judicial review." U.S. *Kloeckner* Br. at 14, 2012 WL 2883261, at *14.

- *Compare*: "[C]onsolidation of review in the Federal Circuit enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoids an unnecessary layer of judicial review in lower federal courts, and encourages more consistent judicial decisions." U.S. Br. 29 (internal quotation omitted);

Court of Appeals." *Id.* But that argument proves nothing. The existence of this extraordinary, and discretionary, procedure for review of *any* MSPB decision does not negate the general statutory directive giving district courts exclusive jurisdiction over mixed cases. *See id.* § 7703(b)(2). Regardless of whether the discretionary review provision, if successfully invoked in a mixed case, would override the statutory directive for district-court review, it certainly does not prove that employee appeals in mine-run mixed cases—whether dismissed on substantive, procedural, or jurisdictional grounds—belong in the Federal Circuit.

With: "Channeling review of such matters to the Federal Circuit ... enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoids an unnecessary layer of judicial review in lower federal courts, and encourages more consistent judicial decisions." U.S. *Kloeckner* Br. at 32-33, 2012 WL 2883261, at *32-33 (internal quotation omitted).

- *Compare*: "[A]llowing district courts (and thus regional circuits) to decide appealability issues" in mixed cases "would frustrate Congress's effort to harmonize the law [and thereby] perpetuate the very situation that the Federal Circuit's creation was designed to curtail." U.S. Br. 30;

  With: "Allowing the district courts and the regional courts of appeals throughout the country to review MSPB decisions would undermine the consistency of interpretation by the Federal Circuit envisioned by § 7703 of the Act." U.S. *Kloeckner* Br. at 33, 2012 WL 2883261, at *33 (internal quotation omitted).

The *Kloeckner* Court soundly rejected this uniformity argument. As the Court explained, "the Government's own approach would leave many cases involving federal employment issues in district court" because district courts may review substantive civil-service issues in mixed cases. *Kloeckner*, 133 S. Ct. at 607 n.4. (And that point is even more compelling post-*Kloeckner*, as district courts now may review procedural as well as substantive civil-

service issues.) Moreover, the Government's uniformity argument "runs into an inconvenient fact": "When Congress passed the CSRA, the Federal Circuit did not exist, and § 7703(b)(1) thus provided, as the general rule, that a federal employee should appeal a Board decision to 1 of the 12 Courts of Appeals or the Court of Claims." *Id.* Finally, the Court noted, "even the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text." *Id.* In light of this stinging rebuke, it is surprising that the Government has chosen to double down on the same uniformity argument in this case.

2. In sharp contrast to the Government's *faux* policy argument, the statutory text highlights a *real* policy argument: Congress wanted to allow federal employees to take their discrimination claims to district court, where those claims are subject to *de novo* review, without forcing the employees either to forfeit related civil-service claims or to litigate twice. Congress obviously concluded that the potential cost of some (presumably temporary) disuniformity in federal civil-service law was more than outweighed by the twin benefits of (1) ensuring a forum for *de novo* litigation of discrimination claims, and (2) avoiding the inconvenience and expense of forcing federal employees to split their claims.

Although the entire purpose of authorizing mixed cases is to prevent the need for claim-splitting, the Government ignores that purpose and essentially argues that the CSRA not only *allows* but *requires* claim-splitting. Thus, the Government concedes that the Federal Circuit cannot adjudicate discrimination claims. *See* U.S. Br. 16. But that is no problem, the

Government asserts, because the Federal Circuit can adjudicate the civil-service jurisdictional issue while the discrimination claim remains in limbo. *See id.* ("The judicial review ... transferred to the Federal Circuit is not review of petitioner's *discrimination claims*, which he will be able to file in district court once he has exhausted them administratively. It is instead review of the discrete question whether the MSPB should have entertained his appeal.") (emphasis in original); *see also id.* at 23 (same); *Ballentine v. MSPB*, 738 F.2d 1244, 1246-48 (Fed. Cir. 1984) (same). And, the Government says, no big deal if the Federal Circuit affirms the Board on the civil-service jurisdictional issue: the employee can just go back to square one and file an entirely new "pure" discrimination claim with his agency's EEO office. *See, e.g.*, U.S. Br. 15, 18, 23, 25, 33, 35. Indeed, the Government declares, there are tolling mechanisms in place to ensure that the employee does not lose the discrimination claim under these circumstances. *See id.* at 9, 23, 25.

But this is all an attempt to rationalize a claim-splitting regime, which is *not* the regime that Congress enacted in the CSRA. To be sure, an employee can always abandon a civil-service claim and pursue a "pure" discrimination claim. But the Government's repeated allusion to that scenario, *see, e.g.*, U.S. Br. 15-16, 18, 23, misses the point. The system does not *require* an employee to relinquish a civil-service claim to preserve the right to pursue a discrimination claim in district court. To the contrary, the system is set up to allow the employee to pursue both claims simultaneously in a single case. Unlike the Federal Circuit, a district court can

adjudicate *both* civil-service claims *and* discrimination claims, *see* Petr. Br. 17 n.*, which is why Congress sensibly decided to route appeals in cases involving both types of claims to district court.

The Government suggests, however, that allowing an employee to appeal the MSPB's jurisdictional dismissal of an alleged mixed case to district court would effectively allow the employee to game the system by filing frivolous cases in the MSPB and thereby evade the statutory exhaustion requirement for discrimination claims. *See* U.S. Br. 12-13, 15-16, 34, 41-42. That suggestion is meritless. As noted above, an aggrieved employee can exhaust serious civil-service claims and discrimination claims by filing a mixed case *either* with the MSPB, *see* 5 U.S.C. § 7702(a)(1), *or* with the agency's EEO office, *see id.* § 7702(a)(2). Either route provides the necessary exhaustion of the claims, and neither route represents an evasion of the other.

If the employee chooses to file a mixed case with the MSPB, but the Board declines to hear the case on jurisdictional grounds, the employee cannot be faulted for failure to exhaust. Rather, the employee may appeal the MSPB's dismissal of the claim to district court. If the district court reverses the MSPB's dismissal of the case, the court would then—by the Government's own admission, *see* U.S. Br. 35—remand for the Board to address the entire case (including both the serious civil-service claims and the discrimination claims) in the first instance. It is far-fetched at best to suggest that an employee would seek to avoid an internal agency exhaustion requirement (which is hardly onerous) through the subterfuge of filing a "pure" discrimination claim as

an ersatz mixed case before the MSPB (*e.g.*, by "assert[ing] that [a] one-day suspension actually lasted for a month," *id.* at 46), and then appealing a jurisdictional dismissal of the case to district court (where the employee would face Rule 11 sanctions if he made factually or legally baseless allegations, and would at best wind up back before the Board). That is akin to suggesting that someone would choose to avoid the burden of walking down the block by instead running a marathon.[4]

3. In the final analysis, the most remarkable thing about the Government's extensive policy discussion is not so much what it says, but what it does *not* say. Although the Government insists that its position "makes sound practical sense," U.S. Br. 16, its position would put dispositive weight on elusive jurisdiction/procedure/substance distinctions, and thus would require litigants and courts to determine whether the MSPB actually dismissed the case on jurisdictional grounds, on the one hand, or procedural or substantive grounds, on the other.

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[4] Contrary to the Government's suggestion, petitioner does not "suggest" that an employee's jurisdictional allegations are controlling only if "nonfrivolous." *See* U.S. Br. 46. Such a limitation makes sense in the analogous context of federal jurisdiction, *see, e.g.*, *Bell*, 327 U.S. at 682-83, since a litigant could seek some substantive or procedural advantage by a frivolous invocation of federal jurisdiction. But, as explained in the text, an employee has nothing to gain by a frivolous invocation of MSPB jurisdiction, so there is no reason to complicate matters by carving out such an exception in this context.

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As the Government explained in *Kloeckner*, such a distinction "has no basis" in the statute, and would be "difficult and unpredictable" to apply in practice. U.S. *Kloeckner* Br. at 25 n.3, 2012 WL 2883261, at *25 n.3; Br. for Resp. in Opp. at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6281813, at *15 (internal quotation omitted). It is hard to make the point any better than the Government did there:

> [A]s a practical matter, it would make little sense for an employee who files an untimely MSPB appeal to obtain de novo review of her discrimination claim in district court, while an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB's jurisdiction, proceeds to the Federal Circuit. And because the MSPB may dismiss on timeliness grounds without examining substantive jurisdiction, [a jurisdiction/procedure distinction] could allow employees with jurisdictionally deficient [civil-service] claims nevertheless to proceed to district court by filing an untimely MSPB appeal.

Kloeckner Br. for Resp. in Opp. at 15-16, 2011 WL 6281813, at *15-16. The Government responds to its dramatic shift in position with a terse but epic understatement: "The government does not now urge any such result." U.S. Br. 41.

Contradicting its position in *Kloeckner*, the Government now insists that applying jurisdiction/procedure/substance distinctions in this context will be easy because litigants and courts will

be bound by whatever label the MSPB places on its decision. Thus, determining whether the Board dismissed on jurisdictional, procedural, or substantive grounds "requires only a reading of the MSPB's written opinion to determine whether the ground for dismissing the appeal was the nonappealability of the underlying personnel action (in which case any judicial review would be in the Federal Circuit) or instead a different ground (in which case any judicial review would go to district court)." U.S. Br. 40.

But just because the MSPB *labels* a dismissal jurisdictional does not mean that it *is* jurisdictional. Were that the case, the MSPB could label any decision rejecting a claim on procedural or substantive grounds "jurisdictional" and thereby ensure review in the Federal Circuit. The law, however, focuses on *substance*, not *labels*. *See, e.g.*, *Fry v. Napoleon Comm. Schs.*, 137 S. Ct. 743, 755 (2017); *Evans v. Michigan*, 133 S. Ct. 1069, 1076 (2013). If the law does not treat the label that an *Article III court* places on its action as conclusive, *see, e.g.*, *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 646 (1988), there is no basis for treating the label that an *administrative agency* places on its action as conclusive.

Indeed, MSPB decisions are often less than a model of clarity on this score. This case is a perfect example: the Board's decision here, while ostensibly "jurisdictional," resolved the critical substantive issue in the case: whether petitioner validly released all of his claims through a settlement. The voluntariness of petitioner's settlement agreement is not remotely a "jurisdictional" issue. *See* Petr. Br.

27-28. In addition, the MSPB treats some deadlines as "jurisdictional" and others as "procedural." *Compare Ballentine*, 738 F.2d at 1248 (jurisdictional) *with Kloeckner*, 133 S. Ct. at 604 (procedural). Whether a timeliness issue is properly characterized as jurisdictional or procedural is a difficult and somewhat metaphysical question, *compare Bowles v. Russell*, 551 U.S. 205, 209-11 (2007) *with id.* at 215-20 (dissenting opinion), and surely beyond the ken of the average *pro se* litigant.

And the Government provides no clue of what happens when the Board rules on alternative grounds, one of which is jurisdictional and another either procedural or substantive. *See, e.g.*, *Davenport v. U.S. Postal Serv.*, 97 M.S.P.R. 417, 417 (2004). The Government is similarly mum on what happens when the Board, addressing a case that encompasses multiple claims, dismisses some on jurisdictional grounds and others on substantive or procedural grounds. *See, e.g.*, *Donahue v. U.S. Postal Serv.*, No. 2:05-CV-04998, 2006 WL 859448, at *1 (E.D. Pa. Mar. 31, 2006). It is thus no surprise that nothing in the statutory text creates any dispositive distinction between MSPB dismissals on jurisdictional, procedural, or substantive grounds, because any such distinction would be both nonsensical and unworkable.

* * *

The Federal Circuit put the law on this misguided path over thirty years ago in *Ballentine* by rejecting the *Government's* request to transfer a mixed case dismissed by the Board on jurisdictional grounds to district court. *See* 738 F.2d at 1245-48. *Ballentine*

held that "procedural or threshold matters, not related to the *merits* of a discrimination claim before the MSPB, may properly be appealed to this court." *Id.* at 1247 (emphasis added). This Court unanimously repudiated that holding in *Kloeckner*, but the *ancien regime* has not yielded gently. It is now time for this Court to eradicate *Ballantine* root and branch, and to clarify that mixed cases are subject to review in district court.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment.

April 10, 2017

Respectfully submitted,

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